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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

WAYNE HOFFMAN, an individual; FREDERIC S. BIRNBAUM, an individual; BRUCE C. BOYLES, an individual; G&G VENTURES, LLC, an Idaho limited liability company; ANDREA LANNING, an individual; and BOB TIKKER, an individual, Plaintiffs/Appellants, vs. THE CITY OF BOISE, IDAHO; a municipal corporation and a political sub-division of the State of Idaho, Defendant/Respondent.	Case No. 47590-2019 Ada County Case No. CV01-19-01127 **RESPONDENT'S BRIEF**

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE LYNN NORTON, DISTRICT JUDGE PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

Cases

Statutes

TABLE OF AUTHORITIES (cont.)

COMES NOW, the Respondent by and through Scott B. Muir, Deputy City Attorney, and hereby files its Respondent's Brief in the above-captioned matter.

STATEMENT OF THE CASE

Respondent ("Boise City") agrees with the statement of the case set forth in Appellant's brief other than as noted below.

Boise City points out what appears to be an oversight, as Appellants state that they do not appeal the dismissal of "the additional Plaintiffs that were added in the Amended Complaint." (Appellants' Br., p. 3.) "[T]his appeal is based on Petitioners' Amended Complaint brought by the first seven listed Plaintiffs." (Appellants' Br., p. 3.) But as can be seen from the pleadings, there were only six Plaintiffs in the original Complaint (R., pp. 000007-000013), so the reference to "the first seven listed Plaintiffs" must be inadvertent, and the appellants consist of those six original Plaintiffs.

In the Summary Statement of Facts, Appellants list allegations from the Amended Complaint as if they were facts, rather than allegations. Boise City specifically disagrees that either the Shoreline Plan or the Gateway Plan "**obligated** the City to finance the CCDC's estimated 'Project Costs'". (Appellants' Br., p. 4.)

ADDITIONAL ISSUES ON APPEAL

1. Boise City requests an award of attorney fees on appeal pursuant to Idaho Code § 12-117 and/or § 12-121.

STANDARD OF REVIEW

The standard of review of a district court's decision to grant a motion to dismiss is the same standard as that used in summary judgment. The standard of review on appeal is the same as

applied by the district court on the motion; i.e., there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *McCabe v. Craven,* 145 Idaho 954, 956, 188 P.3d 896, 898 (2008).

ARGUMENT

A. THE DISTRICT COURT DID NOT ERR IN RULING THAT THE ORIGINAL SIX APPELLANTS LACKED STANDING TO BRING THE ACTION AND DISMISSING THE CASE.

The merits of this matter were never reached by the district court since Boise City filed a Motion to Dismiss pursuant to I.R.C.P. 12(b)(1) & (6) (R., pp. 000023-000024) along with a Memorandum in Support of Motion to Dismiss (R., pp. 000025-000030). Boise City's argument for dismissal was that Appellants lacked standing to file the action. The district court dismissed this action with a finding that Appellants lacked standing, (R., p. 000054) but went further in holding that Boise City's commitment to allocate "revenue allocation financing," also known as "tax increment financing" ("TIF"), to the CCDC for twenty years in the Shoreline Plan and the Gateway Plan did not violate Article VIII, § 3 of the Idaho Constitution. (R., pp. 000056-000058.) The district court provided further analysis of the constitutional issue in its Memorandum Decision and Order Denying Motion to Amend and Alter Judgment. (R., pp. 000097-000106.) The dismissal of the Complaint upon a finding that the Appellants lack standing should be affirmed and that basis for dismissal is discussed in this section. The lack of standing is adequate reason for dismissal in and of itself and could have been the end of the inquiry. But the finding of no violation of Article VIII, § 3 of the Idaho Constitution should also be affirmed and is discussed in the subsequent sections of this brief.

The Supreme Court of Idaho has addressed the specific issue of standing to challenge the validity of an urban renewal plan. *Thomson v. City of Lewiston,* 137 Idaho 473, 50 P.3d 488 (2002). In *Thomson,* plaintiff filed a complaint seeking a declaratory judgment invalidating a Lewiston City Council ordinance approving an urban renewal plan. The complaint alleged that "Plaintiff is a resident and taxpayer in the City of Lewiston, Nez Perce County, Idaho, and a person of interest pursuant to the provisions of § 50-2027 Idaho Code." *Id.* at 475. The Idaho Supreme Court affirmed the holding of the district court that Thomson must establish standing under a traditional standing analysis. *Miles v. Idaho Power Co.,*116 Idaho 635, 778 P.2d 757 (1989) set forth the three elements of standing:

> 1. "The doctrine of standing focuses on the party seeking relief and not on the issues the party wishes to have adjudicated."
>
> 2. "[T]o satisfy the case or controversy requirement of standing, litigants generally must allege or demonstrate an injury in fact and a substantial likelihood that that judicial relief requested will prevent or redress the claimed injury."
>
> 3. "[A] citizen and taxpayer may not challenge a governmental enactment where the injury is one suffered alike by all citizens and taxpayers of the jurisdiction."

Thomson at 477, quoting *Boundary Backpackers v. Boundary County,* 128 Idaho 371, 375, 913 P.2d 1141, 1145 (1996) (quoting *Miles*, 116 Idaho at 641, 778 P.2d at 763).

Idaho Code § 50-2027(2) provides, in pertinent part: "For a period of thirty (30) days after the effective date of the ordinance or resolution, <u>any person of interest</u> shall have the right to contest the legality of such ordinance, resolution or proceeding or any bonds which may be authorized thereby." (emphasis added.) "[T]he legislature did not intend to broaden the traditional standing requirements by using the term 'person of interest' as a person who could bring an action" in enacting Idaho Code § 50-2027. *Thomson* at 478. "By using the term 'any person in interest'

rather than 'any person,' we hold that the legislature intended to limit the number of possible plaintiffs, and incorporate common law standing principles. Therefore, Idaho Code § 50-2027 does not eliminate the need for a plaintiff to satisfy traditional standing requirements. . . ." *Id.* at 478.

As in *Thomson,* Appellants allege that they are residents and taxpayers in the City and County, except for Appellant Mike Gleason being a resident of the City of Eagle, rather than the City of Boise. (R., pp. 000015-000016.) Appellants lack standing because they do not "allege any particularized injury, but rather only an injury that is 'suffered alike by all citizens and taxpayers of the jurisdiction.'" *Id.* at 477. Idaho Code § 50-2027(2) does not confer standing on a plaintiff solely by virtue of being a taxpayer.

Appellants responded to the *Thomson* traditional standing argument claiming that *Koch v. Canyon County,* 145 Idaho 158, 177 P.3d 372 (2008) established that taxpayers of a jurisdiction have standing to seek relief on constitutional grounds. Appellants alleged a violation of Article VIII, § 3 of the Idaho Constitution, which provides, in pertinent part,

> No county, city, board of education, or school district, or other subdivision of the state, shall incur any indebtedness, or liability, in any manner, or for any purpose, exceeding in that year, the income and revenue provided for it for such year, without the assent of two-thirds of the qualified electors.

The plaintiffs in *Koch v. Canyon County, supra* are Canyon County taxpayers who brought suit over a lease entered into by Canyon County for a parcel of land upon which to build a jail and other facilities. It was alleged that the lease agreement violated Article VIII, § 3 of the Idaho Constitution. The district court found that the plaintiffs lacked standing to make that challenge and dismissed the case. The appeal was dismissed because the issue raised became moot, but the Idaho Supreme Court held that electors and taxpayers of Canyon County have standing to

challenge whether the lease agreement violated Article VIII, § 3. *Koch v. Canyon County,* 145 Idaho 158, 163, 177 P.3d 372, 377 (2008). The reason that *Koch* is not applicable to the instant case is that Boise City did not incur any "indebtedness or liability" to bring it within the purview of Article VIII, § 3 of the Idaho Constitution. This was the finding of the district court (R., pp. 000056-000057, 000102-000103), and the basis of that finding is further discussed in the subsequent sections of this brief. The district court was correct in its finding that the injury alleged is one suffered by all taxpayers of the jurisdiction. (R., p. 000054.) Therefore, Appellants needed to meet the traditional standing requirements as enunciated in *Thomson*, which they failed to do.

B. BOISE CITY DID NOT CREATE A CONTINUING OBLIGATION TO THE CCDC IN VIOLATION OF ARTICLE VIII, SECTION 3 OF THE IDAHO CONSTITUTION BY PROMULGATING THE SUBJECT ORDINANCES PURSUANT TO IDAHO CODE § 50-2906.

The district court was correct in dismissing the case for lack of standing, but the following arguments relate to the district court's other basis for dismissal; Boise City did not incur indebtedness or liability, and therefore did not violate Article VIII, § 3 of the Idaho Constitution. (R., pp. 000056-000057.)

The contention that Boise City created a continuing obligation to the CCDC in violation of Article VIII, § 3 of the Idaho Constitution seems rooted in a misunderstanding of tax increment financing ("TIF"). The subject of this lawsuit is two urban renewal plans, the Shoreline Plan and the Gateway Plan. The CCDC formed the districts where TIF funds will be allocated. Once the district is formed the property tax value within the district is assessed, which is the set base value. Under the plans, property taxes are levied as usual, and that portion of the taxes attributable to the set base value goes to the various taxing authorities entitled thereto. These taxing entities include Boise City, the Ada County Highway District, Ada County, School District No. 1, Ada County

Emergency Medical, Mosquito Abatement District, and College of Western Idaho. Under an urban renewal plan, the TIF district receives tax revenues above those generated from the set base value. As property values increase in the TIF district, so do the excess tax revenues that go to the TIF district, while the tax revenues to the other taxing entities remain constant. These excess revenues are the increment in tax increment financing. Spencer W. Holm, *What's the Tiff about TIF?: An Incremental Approach to Improving the Perception, Awareness, and Effectiveness of Urban Renewal in Idaho,* 50 Idaho L. Rev. 273, 281 (2014).

In the Amended Complaint, Appellants acknowledge that "[a]s required by Idaho Code § 50-2908, the TIF revenues allocated to the CCDC pursuant to the Ordinances are calculated and paid directly to the CCDC by the County Treasurer of Ada County, Idaho." (R., p. 000020, ¶ 32.) Boise City does not create a continuing obligation to the CCDC, but rather, the TIF funds go directly to the TIF district from the County Treasurer, and Boise City has simply foregone property tax revenues exceeding those attributable to the set base value in the TIF district. Therefore, Boise City has not created any continuing obligation to the CCDC.

Article VIII, § 3 of the Idaho Constitution speaks of "any indebtedness or liability", specific terms that are not necessarily synonymous with an obligation. Boise City, in following the Local Economic Development Act, Idaho Code § 50-2901 *et seq.* and passing the Shoreline and Gateway ordinances, has not created any indebtedness or liability to Boise City.

C. IN PASSING THE SHORELINE PLAN AND GATEWAY PLAN ORDINANCES, BOISE CITY DID NOT INCUR A "LIABILITY" IN VIOLATION OF ARTICLE VIII, § 3 OF THE IDAHO CONSTITUTION.

Appellants' allegation that the Shoreline Plan and the Gateway Plan create indebtedness or liability for Boise City is not only unsupported by authority, the Idaho Supreme Court has clearly

ruled to the contrary. The only part of tax increment financing that creates indebtedness or liability is the issuance of TIF bonds, but these bonds are issued by the CCDC, not Boise City. Therefore, TIF bonds are an indebtedness or liability of the CCDC, not Boise City, and the Idaho Supreme Court has held accordingly. In *Boise Redevelopment Agency v. Yick Kong Corp.*, 94 Idaho 876, 499 P.2d 575 (1972) and later reaffirmed in *Urban Renewal Agency of the City of Rexburg v. Hart,* 148 Idaho 299, 222 P.3d 467 (2009), the Idaho Supreme Court declared that urban renewal agencies, as authorities independent of cities, are not subject to the constitutional limits on incurring debt without voter approval found in Article VIII, § 3 of the Idaho Constitution. It is the CCDC that may issue TIF bonds.

In 1971, Boise Redevelopment Agency ("BRA") brought a condemnation proceeding against the property of Yick Kong Corporation, after negotiations failed for the purchase of the property for urban renewal. The resulting appeal addressed the constitutionality of the Idaho Urban Renewal Law of 1965, Idaho Code § 50-2001 *et seq.* The district court granted the condemnation, but Yick Kong appealed with one of its claims being that the revenue bonds used by the BRA violated Article VIII, § 3 of the Idaho Constitution, which prevents a municipality from incurring debt without taxpayer approval. The Idaho Supreme Court agreed with the district court on this issue, finding no such constitutional violation. *Boise Redevelopment Agency v. Yick Kong Corp.*, *supra* at 880. Yick Kong argued that the BRA was the alter ego of the City of Boise. The Court ruled differently, finding that, "[t]he degree of control exercised by the City of Boise does not usurp the powers and duties of the plaintiff [BRA], and the close association between the two entities at most shows two independent public entities closely cooperating for valid public purposes." *Id.* at 882. Of more import to the instant case, "[h]erein plaintiff [BRA] has no ability

to actually encumber any of the resources of the City of Boise and cannot spend beyond its own funds and property holdings." *Id.* at 883.

The *Yick Kong* holding was reaffirmed by the Idaho Supreme Court with its 2009 decision in *Urban Renewal Agency of the City of Rexburg v. Hart,* 148 Idaho 299, 222 P.3d 467 (2009). On December 21, 2005, the City of Rexburg approved the Urban Renewal Agency of the City of Rexburg's ("the Agency") plan to construct a public outdoor swimming facility, a sporting and community events building, and outdoor fields using revenue allocation financing. The Agency filed for judicial confirmation of the validity of the bonds to be issued under the plan. On March 28, 2008, Hart filed a Response to Petition for Judicial Confirmation asking that the Agency's petition be denied, asserting as one of his objections, that the Local Economic Development Act, Idaho Code § 50-2901 *et seq.* violates Article VIII, § 3 of the Idaho Constitution, which prohibits a city from incurring an indebtedness or liability exceeding income and revenue for a specific year without the assent of qualified electors. The district court rejected Hart's arguments, he appealed, and nine urban renewal agencies filed a brief as *amici curiae* in support of the Agency. The Idaho Supreme Court affirmed the district court and rejected Hart's argument that "[A]gencies are merely 'alter egos' of their cities – and thus urban renewal agencies' use of revenue allocation financing violates Article VIII, §§ 3 and 4 of the Idaho Constitution." *Id.* at 301. Hart made the same "alter ego" argument that the Idaho Supreme Court rejected in *Boise Redevelopment Agency v. Yick Kong Corp.*, which decision was reaffirmed. *Id.* at 302.

> The Agencies' brief demonstrates that cities across the State have financed over 60 projects through revenue allocation financing in the 27 years since we decided *Yick Kong.* This widespread reliance on our holding that urban renewal agencies are not "alter egos" of cities is well-justified, given that the decision was unanimous. 94 Idaho at 885, 499 P.2d at 584. If we were to accept Hart's argument that urban renewal agencies are merely alter egos of their respective municipalities, we would

> overrule unanimous, long-standing precedent and thwart the reasonable expectations of numerous bondholders. We are unable to conclude that our decision in *Yick Kong* is "manifestly wrong." Accordingly, "'the rule of stare decisis dictates that we follow it. . . .'" *Greenough v. Farm Bureau Mut. Ins. Co. of Idaho,* 142 Idaho 589, 592, 130 P.3d 1127, 1130 (2006) (quoting *Houghland Farms, Inc. v. Johnson,* 119 Idaho 72, 77, 803 P.2d 978, 983 (1990)).

Id. at 303.

Boise City acted in accordance with the authority given it by the Idaho State Legislature through the Local Economic Development Act (Idaho Code § 50-2901 *et seq.*). Idaho is a Dillon's Rule state. Specifically, Dillon's Rule provides:

> It is a general and undisputed proposition of law that a municipal corporation possesses, and can exercise, the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in, or incident to, the powers expressly granted; third, those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied. . . . These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations.

John F. Dillon, *Commentaries on the Law of Municipal Corporations*, § 55, at 101-02 (1872).

Dillon's Rule has been adopted by the Idaho Supreme Court in regard to municipal corporation law. "Idaho has long recognized the proposition that a municipal corporation, as a creature of the state, possesses and exercises only those powers either expressly or impliedly granted to it." *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980) (citing *Sandpoint Water & Light Co. v. City of Sandpoint*, 31 Idaho 498, 503, 173 P. 972, 973 (1918); *Boise Dev. Co. v. Boise City*, 30 Idaho 675, 688, 167 P. 1032, 1034-35 (1917)). Indeed, "under Dillon's Rule, a municipal corporation may exercise only those powers granted to it by either the state constitution or the legislature and the legislature has absolute power to change, modify or destroy

those powers at its discretion." *Id.* (citing *State v. Steunenberg*, 5 Idaho 1, 4, 45 P. 462, 463 (1896)).

The Local Economic Development Act ("the Act"), Idaho Code § 50-2901 *et seq.* expressly grants municipalities the ability and authority to finance the economic growth and development of urban renewal areas. The Act expressly defines the powers granted to the municipality and sets forth its role in revenue allocation financing as part of an urban renewal plan. Idaho Code § 50-2904 specifically authorizes Idaho cities to enact ordinances that adopt urban renewal plans containing revenue allocation financing provisions, in pertinent part, as follows:

> An authorized municipality is hereby authorized and empowered to adopt, at any time, a revenue allocation financing provision, as described in this chapter, as part of an urban renewal plan or competitively disadvantaged border community area ordinance.

Idaho Code § 50-2904.

Idaho Code § 50-2910 states that the bonds issued under the Local Economic Development Act are not the general obligation of the agency or municipality, as follows:

> Except to the extent of moneys deposited in a special fund or funds under this act and pledged to the payment of the principal of and interest on bonds or other obligations, the agency shall not be liable on any such bonds or other obligations. The bonds issued and other obligations incurred by any agency under this chapter shall not constitute a general obligation or debt of any municipality, the state or any of its political subdivisions. In no event shall such bonds or other obligations give rise to general obligation or liability of the agency, the municipality, the state, or any of its political subdivisions, or give rise to a charge against their general credit or taxing powers, or be payable out of any funds or properties other than the special fund or funds of the agency pledged therefor; and such bonds and other obligations shall so state on their face. Such bonds and other obligations shall not constitute an indebtedness or the pledging of faith and credit within the meaning of any constitutional or statutory debt limitation or restriction.

Idaho Code § 50-2910.

Boise City has complied with the Local Economic Development Act, Idaho Code § 50-2901 *et seq.* in passing the Shoreline and Gateway ordinances. If Appellants are challenging the constitutionality of the Local Economic Development Act with which Boise City complied, Appellants have the burden of overcoming the presumption that the legislation is valid. *State v. Mowrey*, 134 Idaho 751, 754, 9 P.3d 1217, 1220 (2000). It is "generally presumed that legislative acts are constitutional, that the state legislature has acted within its constitutional powers, and any doubt concerning interpretation of a statute is to be resolved in favor of that which will render the statute constitutional." *McLean v. Maverik Country Stores, Inc.*, 142 Idaho 810, 814, 135 P.3d 756, 760 (2006) (quoting *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 491 P.2d 1285, 1288 (1990)).

Appellants' contention that the subject ordinances create some sort of "promissory liability", is completely lacking of any factual or legal authority. (Appellants' Br., p. 19.) Simply put, the Shoreline and Gateway ordinances do not create any indebtedness or liability in Boise City.

D. BOISE CITY IS ENTITLED TO ATTORNEY'S FEES ON APPEAL PURSUANT TO IDAHO CODE § 12-117 AND/OR § 12-121.

This appeal was brought in disregard to established Idaho case law. *Thomson v. City of Lewiston,* 137 Idaho 473, 50 P.3d 488 (2002) holds that under Idaho Code, Appellants lack standing to challenge the urban renewal districts. The Idaho Supreme Court established that the City does not create an indebtedness or liability in creating an urban renewal district and therefore does not violate Article VIII, § 3 of the Idaho Constitution. *Boise Redevelopment Agency v. Yick Kong Corp.,* 94 Idaho 876, 499 P.2d 575 (1972), *Urban Renewal Agency of City of Rexburg v. Hart,* 148 Idaho 299, 303, 222 P.3d 467, 471 (2009). Boise City is entitled to an award of

reasonable attorney's fees as the prevailing party in an appeal brought without a reasonable basis in fact or law pursuant to Idaho Code § 12-117. In the alternative, Boise City is entitled to an award of reasonable attorney's fees pursuant to Idaho Code § 12-121 as this appeal was brought or pursued frivolously, unreasonably or without foundation.

CONCLUSION

Based upon the foregoing reasons, the Respondent respectfully requests that this Court affirm the judgment of the district court below, granting Defendant's Motion to Dismiss, and dismissing Plaintiffs' Amended Complaint with prejudice. The Respondent also seeks an award of reasonable attorney's fees and costs on appeal.

DATED this 14th day of August 2020.

OFFICE OF THE CITY ATTORNEY

Scott B. Muir

Scott B. Muir, Deputy City Attorney
Attorney for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that I have on this 14th day of August 2020, electronically filed the foregoing with the Clerk of Court using the iCourt system which sent a Notice of Electronic Filing to the following persons:

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